



WOMEN'S LEGAL EDUCATION AND ACTION FUND

344 RUE BLOOR ST. W., SUITE 403, TORONTO

FONDS D'ACTION ET D'ÉDUCATION JURIDIQUES POUR LES FEMMES

CANADA M5S 1W9 416-963-9654

SUBMISSIONS
TO THE ONTARIO TASK FORCE
ON MANDATORY RETIREMENT
(THE IANNI COMMISSION)

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SUBMISSION TO THE TASK FORCE ON MANDATORY RETIREMENT

The Women's Legal Education and Action Fund ("LEAF") is a national, non-profit organization whose goal is the advancement of women's equality. LEAF's primary strategy for the achievement of its objective is litigation, relying upon the guarantees in the Canadian Charter of Rights and Freedoms and, in particular, the equality guarantees contained in sections 15 and 28 of the Charter. On October 16, 1985, the Government of Ontario provided LEAF with one-million dollars to conduct Charter litigation on behalf of women in Ontario. LEAF also presents briefs to legislative and parliamentary committees on matters which further its goal of advancing equality for women.

With respect to equality in employment for women, LEAF has been involved in three Ontario cases in which it obtained relief for women who were facing compulsory retirement. In two of these cases, LEAF was successful in securing a year's extension of employment for each employee and in the third case, LEAF's efforts resulted in the establishment of a company pension plan, and a result satisfactory to the woman involved.¹ LEAF is also now representing a woman in British Columbia who is challenging her mandatory retirement from the provincial civil service.

In a fourth Ontario case presently before the courts, LEAF is supporting Ms. Velma Windus in a challenge to her forced retirement from her position as an Accounts Payable Clerk at Dufferin Area Memorial Hospital. Ms. Windus is challenging s.9(a) of the Ontario Human Rights Code which permits employers to force the retirement of those employees aged 65 or over.

In this brief, we shall address the extent to which mandatory retirement constitutes sex discrimination against women, because of its disproportionate adverse effect on them. The predicament of Ms. Windus, whose work history is typical of many women, is particularly illustrative of the disparate impact which mandatory retirement has on women. To paraphrase a question posed on page 4 of this Commission's Overview, because of her "relatively low lifetime income and relatively small pension payment",

she along with many women has a particularly strong reason to favour the prohibition of mandatory retirement. Ms. Windus' situation is more fully detailed in the Affidavit she filed in the court proceedings, attached as Appendix A to this brief.

In Part I of this brief, we describe some of the serious economic and social effects of mandatory retirement on elderly women, resulting from such factors as the generally lower wages paid to women than to men, the different career history of women workers, and the correspondingly lower or non-existent pension benefits which women generally receive. In Part II, we set out our position that mandatory retirement must be viewed, both legally and socially, as constituting unjust sexual discrimination, which a society truly committed to equality for women simply cannot condone.

PART I - THE ADVERSE AND DISCRIMINATORY EFFECT OF MANDATORY RETIREMENT

Mandatory retirement quite clearly exacerbates an already very serious problem for elderly women, namely, their inability to support themselves and maintain an adequate standard of living. Numerous studies have demonstrated that older women face severe economic restraints. As the Canadian Council on Social Development observed in its 1979 report entitled Factbook on Poverty, "to be old and female is the best combination to ensure being poor".² A recent study summarized the statistical evidence of the deplorable economic condition of older women as follows:³

"The number of women over 65 below the poverty line is far greater than the number of men. By any accounting, a disproportionate number of women over sixty-five are disproportionately poor. A study done by the National Council of Welfare baldly states: 'There has been considerable progress against poverty among the aged. However the reduced risk of poverty has benefited elderly men more than women. . . One conclusion stands out from all the facts and figures: Poverty in old age is largely a woman's problem, and is becoming more so every year.' Interestingly, these

seemingly damning statements come from an official government publication, distributed at no cost by the Department of Health and Welfare. They are hardly the conclusion of a dissatisfied radical fringe group.

What then are the facts and figures? The simplest numerical comparison is perhaps the most telling. In 1981, approximately 415,000 women and 189,000 men over age sixty-five were below the poverty line. The calculations took into consideration both families and unattached individuals, and were conservative estimates. (These numbers, incidentally, represent one-quarter of Canada's elderly population.) Thus, there were more than twice as many poor elderly women as poor elderly men in 1981. Approximately seven out of ten elderly Canadians who live below the poverty line are women.

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The picture is even worse for the older woman. Sixty-five per cent of unattached women aged 70 and over were poor in 1981. Of the total unattached poor population in Canada in 1984, 7.5% were elderly unattached men, whereas 27.7% were elderly unattached women."

That older women are substantially worse off than older men is also illustrated by the report of the National Council of Welfare entitled Sixty-Five and Older (1984), which found that in 1982, women represented four-fifths of those unattached individuals over age 65 living in a state of poverty; in real numbers, the report showed that 337,000 unattached women over the age of 65, as opposed to only 85,000 unattached men of the same age group were categorized as poor.⁴ The National Council of Welfare report goes on to state:⁵

"Elderly women are worse off than elderly men... the large majority (80 percent) of elderly women had incomes of under \$10,000 in 1982, compared to 54% of aged men. A tiny proportion of elderly [women] (3.5 percent) reported incomes over \$25,000, in contrast to 11.3 percent of aged men. The median income of aged women (\$6,440) was only 69 percent of the median income of elderly men (\$9,349)."

The poverty of such a large number of older women - and the corresponding need for women to have the opportunity to continue to work beyond age 65 - is clearly attributable to a number of factors:

- (1) those women who have participated in the workforce have generally earned wages which are lower than those paid to their male counterparts. This wage gap results from discriminatory employment practices as well as the occupational segregation of women in positions which are typically characterized by low rates of unionization, high labour turnover, low wages and fringe benefits, and society's general undervaluing of women's work;
- (2) the career patterns and work histories of women differ from those of men, in that many women never enter the paid labour force at all, or enter the workforce later in life, or leave and subsequently re-enter the workforce, as a result of child rearing and other responsibilities; and
- (3) the entitlement of women to both public and private pensions tends to be lower because benefits are directly tied to wage levels and indirectly to work histories.

We do not intend to review in detail the numerous studies, statistics and reports, which have clearly documented the contrast between the wage levels and work histories of women and men, and the resulting impact on the economic situation of older women.⁶ Suffice it to note that, with respect to wage levels, although the participation rate of women in the labour force has increased from 23% to 63% in the period from 1951 to 1981, the average wage paid to women still continues to be only 60% of the average wage paid to male employees.⁷ In addition, 71% of all part-time work is performed by women.⁸ Part-time workers are typically "more ghettoized, lower paid, and with less chance of improving their position than full-time women workers".⁹ This disparity in wages and annual income paid to working

women translates directly into an inability to accumulate savings to enable them to provide for themselves in their later years.

Equally important, the economic situation of elderly women is aggravated by the effect of the different work histories of women in comparison to men. Many women now approaching age 65 entered the workforce late in life, often because they had stayed at home to raise families and subsequently entered or re-entered the labour force when their domestic responsibilities allowed them to do so. In addition, changing societal perceptions concerning the role of women in the workforce has made paid employment a realistic option for more women. Further, many of these women entered or re-entered the labour force due to a disadvantaged economic situation, often following a divorce. In that regard, although women generally are more economically disadvantaged by divorce than are men, women whose divorces pre-date the family law reforms of the 1970's and 80's were particularly disadvantaged. Prior to those reforms, inequitable family laws often led to the exclusion of pensions from property division and made maintenance awards subject to stringent conditions.

In addition, many women have been subject to discriminatory employment practices upon marriage or pregnancy which have caused them to have either shorter work histories or an interrupted career pattern. Many of these practices have had a particularly adverse effect on those women presently approaching age 65. For example, until 1955, women could not be employed in the federal civil service if they were married, and were fired upon marriage.¹⁰ Until 1970, women employed in the provincial civil service were denied maternity leave for second and subsequent children.¹¹ Even today, airline stewardesses are required to take leaves of absence without pay in their fourth month of pregnancy.¹²

The general pattern of women's work history, particularly for those women approaching age 65, and the effects of that work history, has been described as follows:¹³

"Because women tend to move from job to job, they will lose seniority benefits (including a better salary) that attach to long employment with one company. They will frequently be forced to find work in the service industries or low-paying jobs in small business which have no private pension plans. More women than men change jobs because of changed residence hinting that women may often have to leave jobs to follow a transferred husband, and further many women are required to find work that is compatible with their child-care duties and home-making obligations, in general precluding jobs that require travel, or long or irregular hours."

This work history, coupled with the lower wages women generally receive, frequently results in many women being retired without any private pension plan benefits or with benefits which are totally inadequate to replace their previous employment income. In Retirement Without Tears, the Special Senate Committee on Retirement Age Policies concluded that the retirement income situation for elderly women is "especially dismal":¹⁴

"In the past, the evolving complex of private pension plans discriminated against women, sometimes in a flagrant manner. The reasons for this derived mainly from the special place of women in the family and the labour market in the nineteenth and early twentieth centuries. The legacy of earlier times persists today with the result that women, particularly elderly women, are often treated unfairly by private pension plans in comparison with their male counterparts."

A much lower percentage of women than men have an employment record which would make them even eligible for private pension plans. According to the Statistics Canada publication in 1982, entitled Pension Plans in Canada, while 46.8% of all employed paid workers were covered by private pension plans, only 36.5% of the female workforce are covered by those plans.¹⁵ This can be accounted for at least in part by the exclusion of part-time workers from the majority of private pension plans, and the concentration of female workers in the trade and service industries, where pension plan coverage is generally lower than in male dominated industries such as mining, construction, and manufacturing. As well, existing portability and vesting

requirements substantially diminish the pension eligibility of many women, as a direct result of their work histories.

Even where women are entitled to participate in pension plans, the value of the plan is typically not sufficient to meet their expenses. In "Why is Poverty After 65 a Woman's Problem", Professor Jennifer L. Warlick observed that, in the U.S., only 23% of families with female heads had private pension income, including survivorship benefits, and the mean value of pensions received by female heads was only 31% of that received by male heads.¹⁶ In addition, sex-based mortality tables used to calculate pension benefits have a discriminatory effect upon women, who either contribute more than men to earn the same retirement benefits, or receive a lower pension benefit notwithstanding contributions equal to those of their male counterparts. Although legislation has been proposed to abolish sex-based actuarial tables in Ontario, this will not go very far towards alleviating the present plight of older women, and will not assist those women who have been victims of past discrimination.

In addition, public pension plans no more provide an adequate income for older women than do private pension plans. Women are not permitted to make contributions for the kind of work which is not directly subject to monetary quantification, such as child-rearing, housework, or work in a spouse's business or on a farm. Survivor benefits under both public and private pension plans are inadequate and rarely attribute pension earnings of one spouse to the other spouse upon death. Finally, public pension plans, no less than private pension plans, also provide women with benefits which reflect the overall lower lifetime earnings of women in comparison with men.

In this connection, it is LEAF's view that, far from harming the attempts being made by women's organizations and others to gain better pension provisions for women, a prohibition on mandatory retirement is complementary to such efforts. In both cases, the objective is to provide

older women with adequate incomes, and to place women in a position of real economic and social equality with men. Moreover, to provide fair and equal pension benefits to women is a matter of fundamental fairness and sexual equality, and is not in any way linked to perpetuating the discriminatory effects which result from mandatory retirement. Women and men both should have the right to an adequate pension income after retirement, and the right to choose the time of retirement which is consistent with their physical well-being, contribution to the workplace, and financial and psychological security.

Ms. Windus' situation is a vivid example of the realities facing many older women subject to mandatory retirement:

- (1) upon becoming pregnant with her first child, she was forced to "retire" as a result of her employer's policy that pregnant women must "retire", which meant that she did not work long enough to earn any pension credits;
- (2) her first "retirement" was shortly after her marriage and she subsequently stayed at home to care for her children and husband;
- (3) later in life she worked in a family business with her husband, without salary;
- (4) because of her work as a homemaker and in a business with her husband, she did not contribute to either a public or a private pension plan during much of her working life;
- (5) at the age of 48, when her children were older, she retrained and re-entered the paid workforce with the Dufferin Area Memorial Hospital as an Accounts Payable Clerk (a female occupation with relatively low wages);

- (6) at the age of 65, in perfectly good health, eager to work, and with a limited pension income, she has been forced to retire.

Thus, one need only look at the economic situation of Ms. Windus to see how mandatory retirement has a disproportionate discriminatory effect upon women. The full particulars of her economic situation are set out in the affidavit (appended to this brief) which she filed with the court in her challenge to mandatory retirement. What clearly emerges is that Ms. Windus has been less able than her male counterparts to save for her retirement, because of her lower overall earnings and her intermittent work career. She will receive an inadequate pension because of the deficiencies in both private and public pension plans identified above. While the abolition of mandatory retirement will obviously not solve all the economic problems of elderly women, its perpetuation clearly deprives women such as Ms. Windus of the human dignity which can only be sustained through an adequate income.

Moreover, it is important to note that mandatory retirement is not solely an economic issue, but also has a profound psychological and social impact. One psychologist has summarized the effect in this way:¹⁷

"The loss of roles excludes the aged from significant social participation and devalues them. It deprives them of vital functions that underly their sense of worth, their self-conceptions and self-esteem. In a word, they are depreciated and become marginal, alienated from the larger society. Whatever their ability, they are judged invidiously, as if they had little of value to contribute to the world's work and affairs. . . they tend to be tolerated, patronized, ignored, rejected or viewed as a liability. They are first excluded from the mainstream of social existence, and because of this non-participation, they are then penalized and denied the rewards that earlier came to them routinely."

The devastating social and psychological effects of mandatory retirement have also been described as follows:¹⁸

"Formerly useful skills are consigned to the scrap heap overnight. . . Condemning the elderly to 'an idleness that hastens their decline,' age-based involuntary retirement tends to affect all personal relations and to evoke 'the sorrow of parting, the feeling of abandonment, solitude and uselessness'.

In sum, from a position as an active and useful member of society, overnight an aged person is relegated to the club of senior citizens, under a thoughtless, inconsiderate system of compulsory retirement, and becomes a target of condescension, neglect, and contempt. Instead of embarking upon a new life of enjoyable leisure 'in the golden years', people who are forced to retire, except for a fortunate few, are thrust into an agonizing path of doubt, insecurity, emptiness, and futility."

As this brief has sought to demonstrate, women have a substantially reduced opportunity of being among the "fortunate few" who are able to live a new life of enjoyable leisure in the "golden years". The problems of social isolation, dislocation and alienation experienced by many elderly after mandatory retirement are compounded in the case of women who are more likely to live longer than men, and more likely to live alone in their old age. A recent survey indicates that over two-thirds of women who had been mandatorily retired identified social contact as something they missed by not working following mandatory retirement, compared to 43.5% of men.¹⁹

PART II - MANDATORY RETIREMENT AS SEX DISCRIMINATION

It is now well recognized in Canadian law that employment discrimination occurs not only when an employer overtly or deliberately imposes disadvantages upon employees because of their race, sex, age, etc. (for example, by deliberately not hiring or promoting an employee because she is a woman), but also through the imposition of a policy or rule which has an adverse and discriminatory effect. This view was most forcefully set forth by Mr. Justice McIntyre for the Supreme Court of Canada in the recent decision

in Ontario Human Rights Commission and Theresa O'Malley v. Simpsons Sears,
where the Court explained adverse effect discrimination as follows:²⁰

"The distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. . . On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force. . . An employment rule honestly made for sound economic or business reasons, equally applicable to all whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

Similarly, courts in the United States have recognized that discrimination includes the unequal effect or impact of employment rules or practices on protected groups. In one of the leading American decisions, Griggs v. Duke Power Company, the U.S. Supreme Court unanimously adopted the adverse effect or "disparate impact" view of discrimination, in determining that an employer had discriminated on the basis of race, by requiring both high school diplomas and successful scores on aptitude tests, when those requirements had the effect of eliminating a disproportionate number of qualified black applicants:²¹

"Under the Act, practices, procedures or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices. . . The Act prescribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act

to the consequences of employment practices, not simply the motivations. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In the United Kingdom, legislation prohibits discrimination which has a disproportionate effect on women and which cannot be shown to be justifiable. An excellent recent example of the British approach is found in Huppert v. University Grants Committee and University of Cambridge.²² In this case, the Employment Appeals Tribunal held that a requirement that applicants for a "new blood" university program be 35 years of age or younger constituted adverse effects discrimination against women.

In the Tribunal's view, the age limit was more likely to have an adverse affect on women than men, because women typically delayed employment until they had established their families. Furthermore, the Tribunal rejected the respondent's argument that the age bar was justifiable for the following reasons:²³

"It seems to us that it would have been the easiest thing in the world to have provided that the 35 age limit would be reconsidered in respect of a suitable candidate who had been delayed in her academic career by reason of the fact that she had borne and brought up children or for a reason connected with her sex. It would not provide an open-ended means by which women could get into posts which would otherwise be occupied by men. There are no doubt many single women or many women who have got no children or even some with children who have not been incommoded in any way and they would not be able to avail themselves of such a let-out provision."

In LEAF's view, mandatory retirement is another example of adverse effect discrimination against women. Because of special characteristics of women as employees, including their relatively low wages and shorter work histories, and their low levels of pension benefits, a mandatory retirement policy has a disproportionate and discriminatory adverse effect upon women.

PART III - CONCLUSION

In these submissions to the Task Force on Mandatory Retirement, we have highlighted some of the economic and social factors which make mandatory retirement an issue of special significance for women. Equal pay for work of equal value, increased protection of part-time workers, and reform to both public and private pension plans are certainly necessary to improve the economic status of women. However, present practices such as mandatory retirement also preserve and perpetuate the subordinate, impoverished position of older women by forcing many to retire from the workforce with inadequate income and savings, when they are otherwise capable of working. The elimination of mandatory retirement will afford women presently in the workforce the opportunity to provide for themselves and thus reduce the effects of a lifetime of discrimination.

LEAF supports Ms. Windus in her legal challenge to the mandatory retirement policy of the Dufferin Area Memorial Hospital, and supports the prohibition of mandatory retirement, because of the disproportionately adverse effect of mandatory retirement on older women. As described in this brief, older women generally have lower savings, lower pensions and lower earnings to support themselves in their later years. Today's older woman has experienced sex discrimination in many aspects of her working life; she should not now be deprived of the opportunity to work when she is healthy and eager to do so, and when she is able to take advantage of society's acceptance and recognition of the right of women to participate in the workforce.

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Women's Legal Education and
Action Fund
344 Bloor Street West
Suite 403
Toronto, Ontario
M5S 1W9

FOOTNOTES

1. LEAF Litigation Year One (LEAF, March 31, 1986), at pp. 10-11.
2. Canadian Council on Social Development, Factbook on Poverty (1979). Also cited in M. Novak, Successful Aging (Penguin Books, 1985) at p. 147.
3. Susannah Worth Rowley, "Women, Pensions and Equality" in Boyle et al., Charterwatch: Reflections on Equality (Carswell, 1986) 283, at pp. 297-298.
4. National Council of Welfare, Sixty-Five and Older (Ministry of Supply and Services, 1984) at p. 30.
5. Ibid., p. 39.
6. Ibid. Also see: National Council of Welfare and Poverty, Poverty in Canada (Ottawa, 1982) Table 1; Armstrong and Armstrong, The Double Ghetto (Toronto, McClelland and Stewart, 1978); and The Report of the Commission on Equality In Employment (Ministry of Supply and Services, 1984).
7. Women in the Work World, Statistics Canada (Ministry of Supply and Services, 1984), Charts 2, 3. Also see: The Elderly in Canada, Statistics Canada (Ministry of Supply and Services, 1984).
8. Women in the Labour Force 1985-1986, Table I-14, (Ministry of Supply and Services, Women's Bureau, 1986).
9. White, "Part-time Work: Ideal or No Deal?", in Pask et al., Women, The Law and The Economy (Butterworths, 1985) 13 at p. 18. Also see for a discussion of part-time work the Federal sector, A Survey of Part-Time Employment in Federally Regulated Industries (Ministry of Labour, 1986) Vol. 2 and the Report of the Commission of Inquiry into Part-Time Work (Ministry of Labour, 1983).
10. Civil Service Regulations 1949 P.C. 5700, s.36 and s.113, amended in P.C. 1955-1606, S.O.R. 155-406.
11. The Public Service Act 1961-62, O. Reg. 190/62 s.9, amended in O. Reg. 323/63 and O. Reg. 545/70.
12. R. v. Pacific Western Airlines Ltd. [1975] C.L.L.C. ¶ 14,287.
13. Supra, fn 4. at p. 310.
14. at p. 65. Also see for a discussion of sex discrimination and pension eligibility, Louise Dulude, Pension Reform with Women in Mind (Ottawa: Canadian Advisory Council on the Status of Women, 1981).

15. Statistics Canada, Pension Plans in Canada, (Ministry of Supply and Services, 1982) p. 14.
16. (1985), 40 Journal of Gerontology 751 at p. 754.
17. Roadburg, Aging: Retirement, Leisure and Work in Canada (1985), at p. 91.
18. McDougal, Lasswell and Chen, "The Protection of the Aged from Discrimination", in Human Rights and World Public Order (Yale University Press 1980), p. 782 quoting Simone de Beauvoir, The Coming of Age (P. O'Brian trans. 1972) at p. 273.
19. Supra, fn 15 at p. 93-94.
20. O.H.R.C. v. Simpsons Sears (1986), 23 D.L.R. (4d) 321, at p. 332.
21. 401 U.S. 422 (1971) at p. 429-430.
22. Huppert v. University Graduate Committee and University of Cambridge (Unreported decision of the Industrial Appeals Tribunal, March 14, 1986).
23. See attached copy.